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No. 85-.....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PRUDENTIAL FEDERAL SAVINGS
& LOAN ASSOCIATION,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in a case involving the wrongful termination of an employee brought under the Age Discrimination and Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, the district court must instruct on the shifting burdens of proof set forth in *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973) in the absence of direct proof of discrimination.

2. Whether pursuant to *Trans World Airlines, Inc. v. Thurston,* _____U.S. _____, 105 S.Ct. 613 (1985) liquidated damages for a "willful" violation of the ADEA can be awarded in the absence of proof that an employer should have known that its conduct violated the ADEA.

3. Whether an award of liquidated damages under the ADEA is available where the employer shows that the act or omission giving rise to the violation was taken reasonably and in good faith.

4. Whether an award of future damages in lieu of reinstatement is improper under the ADEA.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Prudential Federal Savings & Loan Association[1] (Prudential), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit on remand which was entered in this proceeding on May 28, 1985. On January 14, 1985, this Court granted Prudential's first Petition for a Writ of Certiorari and remanded

[1]Prudential Federal Savings & Loan Association is an association chartered under the laws of the United States of America and is a wholly owned subsidiary of Prudential Financial Services Corporation (PFSC), a Utah corporation.

this case to the Tenth Circuit for reconsideration in light of *Trans World Airlines, Inc. v. Thurston*, _____ U.S. _____, 105 S.Ct. 613 (1985) (*TWA v. Thurston*). *See Prudential Federal Savings & Loan Association v. EEOC*, _____ U.S. _____, 105 S.Ct. 896 (1985).

OPINIONS BELOW

The Opinion of the Court of Appeals on remand is reported at 763 F.2d 1166 (10th Cir. 1985). The original Opinion of the Court of Appeals which was vacated by this Court on January 14, 1985 is reported at 741 F.2d 1225 (10th Cir. 1984). No opinion was issued by the District Court for the District of Utah.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 28, 1985. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29, Section 626(b)

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Pro-*

vided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

* * * *

2. United States Code, Title 29, Section 216(b)

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

* * * *

STATEMENT OF THE CASE

In the late 1970's, the savings and loan business entered a serious depression as a result of adverse economic conditions. In 1979, Prudential's management foresaw the impending economic downturn and chose to adopt stringent cost-cutting measures to maintain the company's viability. A Coordinating Committee was organized to study every facet of the company and recommend consolidation or elimination of all nonessential positions and personnel. Those recommendations resulted in a massive, on-going reduction in force. From 1979 to 1982,

the number of full-time employees was cut dramatically, declining from 203 to 84. T. at 849(18)-851(23).

In 1981, the Equal Employment Opportunity Commission (EEOC) brought this action against Prudential alleging that Prudential violated the ADEA when it discharged six employees and demoted a seventh. Jurisdiction of the district court was invoked under Section 626(b) of the ADEA and under 28 U.S.C. §§ 451, 1337, 1343 and 1345 (1982). After a week-long trial, the jury returned a verdict that Prudential had not discriminated with respect to six of the seven employees. The jury found Prudential liable under the ADEA to Douglas Tanner and determined that Tanner had been damaged in the amount of $34,200. However, the jury also determined that the termination of Tanner was not willful. The district court entered judgment in the amount of the verdict, and awarded Tanner an additional $17,000 for future damages "in lieu of reinstatement."

On its original appeal to the Tenth Circuit, Prudential argued that the district court erred in refusing to instruct the jury on the shifting burdens of proof under this Court's opinion in *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), and that the ADEA did not authorize an award of future damages to Tanner. The EEOC argued that the district court erred in instructing the jury on the applicable burden of proof for a willful violation of the ADEA.[2] The Court of Appeals rejected Prudential's arguments and affirmed the jury's verdict and the district court's award of future damages. The Court of Appeals also found that the district court had erred in instructing the jury on the applicable standard for finding a willful violation of the ADEA.

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[2]Prudential and the EEOC appealed the district court's judgment only insofar as it related to Tanner.

Prudential's Petition for a Writ of Certiorari was granted on January 14, 1985, the judgment of the Court of Appeals was vacated and this case was remanded to the Tenth Circuit for further consideration in light of *TWA v. Thurston. See Prudential Federal Savings & Loan Association v. EEOC,* _____ U.S. _____, 105 S.Ct. 896 (1985). A more detailed description of this case is contained in Prudential's original petition for certiorari.

On remand, the Tenth Circuit reaffirmed its opinion that the district court's refusal to give the *McDonnell Douglas* instruction on pretext and its award of future damages were correct under the ADEA. The Court of Appeals reversed its prior holding on willfulness, recognizing that *TWA v. Thurston* "specifically rejected" the Tenth Circuit's earlier formulation of the willfulness standard. The Court of Appeals went on to hold, however, that the district court's instruction on willfulness did not comport with *TWA v. Thurston* and remanded the issue for jury redetermination.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Incorrectly Construed the *McDonnell Douglas* Test by Failing to Instruct the Jury that the EEOC Had to Prove that Prudential's Explanation for Terminating Tanner Was a Pretext.

In the decision below, the Court of Appeals held that the district court was not required to instruct the jury that an ADEA plaintiff has the burden of proving that the employer's nondiscriminatory reasons for terminating the employee were pretextual. The Court of Appeals reasoned that a pretext instruction was unnecessary in an ADEA case since an ADEA plaintiff "need not prove that the

reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference." *Prudential Federal Savings & Loan Association v. EEOC,* 763 F.2d 1166, 1170 (10th Cir. 1985) (hereinafter *Prudential*).

The Court of Appeal's opinion is directly contrary to this Court's opinion in *TWA v. Thurston* and the opinions of other circuits which have considered the issue. *See, e.g., TWA v. Thurston,* 105 S.Ct. at 622; *Tice v. Lampert Yards, Inc.,* 761 F.2d 1210, 1212-13 (7th Cir. 1985); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1017-18 & n.18 (1st Cir. 1979) (where principal evidence of discrimination is provable primarily in classic *McDonnell Douglas* terms, jury should be instructed on *plaintiff's* burden to prove pretext). The shifting burdens of proof set forth in *McDonnell Douglas* clearly apply to ADEA cases. *See TWA v. Thurston,* 105 S.Ct. at 622; *Tice v. Lampert Yards, Inc.,* 761 F.2d 1210, 1212-13 (7th Cir. 1985); *Golomb v. Prudential Insurance Company of America,* 688 F.2d 547, 551 (7th Cir. 1982); *Reeves v. General Foods Corp.,* 682 F.2d 515, 520 (5th Cir. 1982); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1017-18 & n.18 (1st Cir. 1979). Under the *McDonnell Douglas* test, once an employee has established a prima facie case of discrimination, the burden shifts to an employer to articulate, a nondiscriminatory explanation. Once the employer satisfies that burden, the employee can prevail only by showing that the explanation is pretextual. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-57, 101 S.Ct. 1089, 1094-96 (1981). In *TWA v. Thurston* the Court states that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination," 105 S.Ct. at 622, but clarifies that "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct

evidence.'" *Id.* (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). This Court thus made clear that in the absence of direct evidence of discrimination, the *McDonnell Douglas* instruction on pretext must be given.

In this case the Court of Appeals failed to consider the direct evidence standard set forth in *TWA v. Thurston*. The Court of Appeals should have found that the district court erred because it neither gave a pretext instruction nor found direct evidence of discrimination as required by *McDonnell Douglas* and *TWA v. Thurston*. The Court of Appeals' position allows a court to discard the *McDonnell Douglas* test without finding direct evidence of discrimination and thereby mislead the jury into believing that an employer has the burden of not only articulating but of proving a nondiscriminatory explanation for its discharge of an employee. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094 (1981) ("defendant need not pursuade the court that it was actually motivated by proffered reasons"). The Court of Appeals' holding that the jury need not be instructed on the pretext prong of the *McDonnell Douglas* test was clearly prejudicial to the substantial rights of Prudential and requires reversal of the decisions below. This Court should grant certiorari to resolve the conflict in the circuits on this issue.

II.

TWA v. Thurston Precludes as a Matter of Law an Award of Liquidated Damages for a "Willful" Violation of the ADEA Where the Jury Finds that an Employer Should Not Have Known that its Actions Were Taken in Violation of the ADEA.

The ADEA authorizes an award of liquidated damages for violations of its provisions "only in cases of willful violations . . ." 29 U.S.C. § 626(b) (1982). In *TWA v. Thurston*, this Court held that "willfulness" under the ADEA must be predicated on a finding that the employer " 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *TWA v. Thurston*, 105 S.Ct. at 625-26 (quoting *Trans World Airlines, Inc. v. Thurston*, 713 F.2d 940, 956 (2d Cir. 1983)). After consideration of the *TWA v. Thurston* standard, the Tenth Circuit found the district court's jury instruction of willfulness to be incorrect and remanded this case to the district court to determine whether Prudential's actions in this case were "willful." *See Prudential*, 763 F.2d at 1174-75. The Court of Appeal's failure to rule as a matter of law that the instruction given by the district court fully comports with the definition of "willful" articulated in *TWA v. Thurston* was clear error and greatly undermines congressional intent behind the ADEA as interpreted in *TWA v. Thurston*.

In *TWA v. Thurston*, this Court made clear that an employer in an ADEA case acts "willfully" only when it "knew or showed reckless disregard" as to whether its conduct violated the ADEA. An employer acts with "reckle s disregard" only when it " 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law,' " 105 S.Ct. at 624 (quoting *Nabob Oil*

Co. v. United States, 190 F.2d 478, 479 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951)), or "purposely and deliberately evades the Act and fails to do what he knows he ought to do under the Act." *Darby v. United States*, 132 F.2d 928, 930 (5th Cir. 1943) (cited with approval in *TWA v. Thurston*, 105 S.Ct. at 624). A violation is not willful if the employer "had some reasonable basis for failing to comply, or some reasonable ground to think he was not required to do certain things and did not do them because he did not know he was supposed to do them . . . ." *Id.*

The instruction given by the district court in this case more than encompasses the purpose and thrust of the ADEA as interpreted in *TWA v. Thurston*. The district court instructed that liquidated damages could be awarded only if " 'Prudential knew, or should have known that at the time it decided to discharge or reassign the complaining employees, that such decisions and actions were in violation of the law and were intentionally and knowingly done in violation thereof.' " *Prudential*, 763 F.2d at 1174. While the words used by the district court in instructing the jury are not identical to the charge approved in *TWA v. Thurston*,[3] the instruction given allowed the jury to find that Prudential's actions were "willful" if Prudential "should have known" that its actions violated the ADEA and "should have known" that its actions were done "intentionally or knowingly" in violation of the ADEA. The district court's instruction that a violation is willful if Prudential *should have known* that its actions were unlawful is a much lesser standard

[3]The definition of willfulness approved in *TWA v. Thurston* was described as "an acceptable way to articulate a definition of 'willful'," 105 S.Ct. at 626, clearly implying that it was not the only acceptable way.

than the "reckless" standard articulated in *TWA v. Thurston*. Moreover, the "*should have known*" instruction allowed the jury to award liquidated damages if it found that Prudential acted recklessly since a finding that Prudential's actions were reckless necessarily would require a finding that Prudential should have known that its actions were unlawful. *See TWA v. Thurston*, 105 S.Ct. at 625-26; *Haskell v. Kaman Corp.*, 743 F.2d 113, 122-23 (2d Cir. 1984) (violation "reckless" only where employer *aware* that its conduct is governed by ADEA and fails to investigate the matter further); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 & n.12 (3d Cir. 1980).

Not only is the district court's instruction in this case entirely consistent with the reckless disregard standard articulated in *TWA v. Thurston*, but there is no factual basis in the record for the jury to conclude that Prudential " 'wholly disregard[ed] the law . . . without making any reasonable effort' to determine" whether the termination of Tanner as part of its reduction in force constituted a violation of the ADEA. *See TWA v. Thurston*, 105 S.Ct. at 624.

Undisputed testimony demonstrated that Prudential's Board of Directors was aware of the ADEA and specifically discussed its impact on Prudential's employees. T. at 712(23)-715(20); 648(11)-649(19); 721(25)-724(15); 766(15)-767(7). The Board of Directors took specific steps to investigate the ADEA and to determine whether Prudential's actions in the reduction in force would constitute violations of the ADEA. For example, Gene Donovan, President of Prudential, testified that after changes in the age laws had been brought to the Board's attention, he requested Prudential's Personnel Director "to investigate more fully what the nature of that statutory change was so that we could advise our management as how to . . .

remain in compliance." T. at 767(3-7). The Personnel Director investigated the changes in the age law and reported back to the Board concerning it. *Id.* As a result, Prudential's managers were again instructed that "they should be aware of . . . [the ADEA] so that they could be fully compliant with the Act," T. at 777(22)-778(9), and that employee appraisals were to be conducted "with respect to all employees irrespective of their age," and in "a fair, accurate, and consistent manner so that Prudential had the basis for determining employee's performance throughout their entire career to and inclusive of the last day." T. at 768(13)-769(1). In addition, to assure that employee evaluations used in the reduction in force were fairly and accurately compiled, Prudential adopted the practice of focusing on positions and activities which could be eliminated or handled more efficiently by other positions instead of looking at individuals. T. at 902(7-14). It was only after the position and activity had been analyzed that the individual performing the job was considered. *Id.*

To allow the recovery of liquidated damages in the face of such uncontroverted testimony would be tantamount to holding that whenever there has been a violation of the ADEA no additional evidence is necessary to support a finding of "willful" violation, a result directly contrary to congressional intent to allow liquidated damages only for the most egregious violations of the ADEA. *See TWA v. Thurston*, 105 S.Ct. at 624-25; *Spanier v. Morrison's Management Services*, Civ. A. No. C484-PT-1144-S (N.D. Ala. June 12, 1985) (available August 13, 1985, on Westlaw, F.S. file).[4]

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[4]This is not to say that evidence of liability and willfulness are not interrelated. Indeed a proper and fair determination of willfulness must necessarily be based on the same jury finding that there was an

Based on the foregoing undisputed testimony and the jury's finding grounded on an instruction consistent with *TWA v. Thurston*, it is apparent that the Court of Appeals should have ruled as a matter of law that Prudential did not act in reckless disregard of the ADEA, but made a reasonable investigation of the applicability of the ADEA to its reduction in force and took reasonable steps to assure that the reduction in force did not violate the ADEA.

III.

Liquidated Damages Under the ADEA Are Not Recoverable in this Case Because Prudential Acted Reasonably and in Good Faith.

In *TWA v. Thurston*, this Court reasoned that liquidated damages are unavailable for ADEA purposes if the employer "acted reasonably and in good faith in attempting to determine whether . . . [its] plan would violate the ADEA." 105 S.Ct. at 625-26 & n.22. The Tenth Circuit recognized the availability of a good faith defense in ADEA cases, *Prudential*, 763 F.2d at 1174, but held that the record did not contain sufficient facts to demonstrate Prudential's good faith in terminating Tanner. *Id.* at 1175. A thorough examination of the record, however, clearly demonstrates that the Court of Appeals imposed too great of a burden of proof for good faith under the standards articulated in *TWA v. Thurston*. This Court should grant certiorari to review the standards surrounding the good faith defense to liquidated damages and to review whether it was proper for the Court of Appeals to

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intentional violation of the ADEA based on complete development of the facts and circumstances of the case. *See Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F.Supp. 962, 967 n.1 (E.D. Pa. 1985).

remand the issue of Prudential's good faith to the district court.

The Court in *TWA v. Thurston* held that TWA "acted reasonably and in good faith" when it investigated whether its mandatory retirement policy violated the ADEA and took action to ensure that a change in that policy would keep TWA in compliance with the ADEA. *TWA v. Thurston*, 105 S.Ct. at 626. The record in this case, like that in *TWA v. Thurston*, shows without contrary evidence that Prudential took reasonable steps to acquaint itself with the provisions of the ADEA and the potential consequences of its scheduled reduction in force. Faced with serious economic upheavals in the savings and loan industry, T. at 574(23)-577(5), Prudential began a reorganization of its operations and a reduction in its work force to remain viable and competitive in the decreasing savings and loan market. T. at 605(13-23). Prudential organized a Coordinating Committee to fairly and consistently recommend consolidation or elimination of all nonessential positions without regard to particular employees. T. at 507(17)-508(12); 578(3)-579(25); 631(10)-632(3). The Coordinating Committee's analysis of the company necessarily relied upon the experience and recommendations of Prudential's managers. T. at 580(4)-581(12); 752(3-21). Managers were instructed on the requirements of the ADEA and directed to maintain compliance with the Act. T. at 777(22)-778(9). In addition, managers were instructed to fairly evaluate all positions and employees and to make certain that age was not one of the considered factors. T. at 584(20); 768(13)-769(1). There is no evidence that Prudential was ever advised that its policies would discriminate against employees on the basis of age.

As a result of the managers' analyses and recommendations, business judgments were made by Prudential to eliminate certain positions. Tanner's position was one of those positions found to be unnecessary since it was a "specialty" position which could be performed effectively by other positions. T. at 580(4)-582(19); 636(4)-638(11). Prior to the recommendation to eliminate Tanner's position, Tanner's immediate supervisors were instructed on the requirements of the age discrimination laws and that they should be "very honest with people in their appraisals, *regardless of their age.*" T. at 585(19-20). Tanner's supervisor testified that age was never a reason or factor considered by him in evaluating Tanner's position or in recommending the elimination of Tanner's position. He also testified that age was never mentioned in any manner by anyone to him as a reason for elimination of Tanner's position. T. at 583(18-23). The manager who recommended to the Coordinating Committee that Tanner's position be eliminated also testified that age was never a reason for the recommendation and that age was never mentioned to him by anyone as a reason to eliminate Tanner's position. T. at 638(22)-639(5).

It is therefore very clear under the uncontroverted facts that Prudential specifically discussed and acquainted itself with the ADEA prior to the discharge of Tanner and considered what impact the reduction of force would have on older employees. Prudential's reduction in force was part of an overall attempt to mitigate the harmful effects on Prudential of the recessionary period in the savings and loan industry. Prudential took reasonable steps to investigate the applicability of the ADEA to its reduction of force and to assure that evaluations were conducted and recommendations made without consideration of the age of the employee. Moreover, Prudential believed its actions were in accord with the ADEA's

provisions. Thus, much like *TWA v. Thurston*, "[i]t is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan." *TWA v. Thurston*, 105 S.Ct. at 626. *See Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (liquidated damages unavailable where employer in good faith believes it is in compliance with ADEA).

Accordingly, this Court should grant certiorari to clarify the standards surrounding the good faith defense set forth in *TWA v. Thurston* and to clarify that those standards do not require Prudential to adduce further proof of the reasonableness and good faith of its conduct in terminating Tanner.

IV.

The Circuits Are in Conflict as to Whether Damages for Future Economic Loss Are Available Under the ADEA.

In its original petition to this Court, Prudential argued that an award of damages to an employee for assumed future economic losses was not authorized by the ADEA. This Court's order of remand directed the Tenth Circuit to reconsider its holding on future damages in light of *TWA v. Thurston*. *See Prudential Federal Savings & Loan Association v. EEOC*, _____ U.S. _____, 105 S.Ct. 896 (1985). The Tenth Circuit's opinion on remand reaffirmed without modification its earlier holding that future damages were available under the ADEA. *See Prudential*, 763 F.2d at 1172-73. For the reasons set forth in Prudential's original petition to this Court, the Tenth Circuit's holding on future damages is directly contrary to the position of the First Circuit and the purpose and language of the ADEA. The salient portions of Prudential's argument

against future damages are set forth here for the Court's convenience.

The judgment entered by the trial court gave Tanner, in addition to the $34,200 awarded by the jury, an additional sum of $17,000 "as lost retirement and pension benefits accruing through normal retirement, in lieu of reinstatement." On remand, the Tenth Circuit rejected Prudential's argument that an award of future damages is not authorized by the ADEA and that even if such damages could be awarded, they were improper in this case because Tanner did not sincerely desire reinstatement.

In reaching its holding, the Tenth Circuit acknowledged that its ruling was in conflict with the position of the First Circuit. *Prudential,* 763 F.2d at 1172. *See Kolb v. Goldring, Inc.,* 694 F.2d 869, 874 n.4 (1st Cir. 1982) (future economic losses not recoverable under the ADEA). The Tenth Circuit rejected the First Circuit's position, however, subscribing to the position of the Eighth and Ninth Circuits which also approve future damages. *Prudential,* 763 F.2d at 1172. *See Gibson v. Mohawk Rubber Co.,* 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier v. Federated Department Stores,* 672 F.2d 1312, 1319 (9th Cir.), *cert. denied,* 459 U.S. 859 (1982). The position taken by the Eighth, Ninth and now Tenth Circuits, however, is not supported by the language or the purpose of the ADEA. This Court should grant certiorari to affirm the First Circuit position and resolve the conflict among the circuits.

This Court's holding in *TWA v. Thurston* reflects the view that monetary awards in an ADEA case must be consistent with the overall congressional scheme to eradicate age discrimination in employment. *See TWA v. Thurston,* 105 S.Ct. at 625 ("We decline to interpret the liquidated damages provision of ADEA § 7(b) in a man-

ner that frustrates . . . [congressional] intent.") The language of the ADEA demonstrates that Congress intended to selectively incorporate specific remedies for a violation of ADEA provisions. *Id.* at 624; *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 870 (1978). The remedial provisions of the ADEA define the types of monetary relief available to an ADEA plaintiff:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. . . . *Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title* . . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b) (1982) (emphasis added). Thus, to determine the "[a]mounts owing to a person" as a result of a violation of the ADEA, a court must examine "the powers, remedies, and procedures provided in sections 211(b), 216 (except subsection (a) thereof), and 217" of the Fair Labor Standards Act (FLSA).[5]

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[5]Section 211(b) deals with the use of state government personnel to enforce the ADEA and § 217 grants jurisdiction to district courts to enforce ADEA provisions. Neither of these sections are germane to the issues here presented.

Section 216(b) of the FLSA provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected *in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.*

Id. § 216(b) (1982) (emphasis added). Nothing in the language of the FLSA authorizes awards of future economic loss; awards of damages are limited to those specified in the FLSA. *See Martinez v. Behrings Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959). Similarly, the type of relief available under the ADEA is limited to that which is available under the FLSA. *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 686-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978). *See Ginsberg v. Burlington Industries, Inc.*, 500 F. Supp. 696, 700-01 (S.D.N.Y. 1980) (damages for ADEA violations are no broader than FLSA remedies). The First Circuit has expressly held that "damages [for ADEA purposes] are 'settled' on the date of judgment and the plaintiff cannot then recover damages for future economic loss or 'front pay.' " *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982). *See, also Foit v. Suburban Bancorp*, 549 F. Supp. 264, 267 (D. Md. 1982) (ADEA does not permit recovery of anticipated loss of future earnings); *Bleakley v. Jekyll Island-State Park Authority*, 536 F. Supp. 236, 244-45 (S.D. Ga. 1982); *Jaffee v. Plough Broadcasting Co.*, 19 Fair Empl. Prac. Cas. (BNA) ¶ 9062 (D. Md. 1979); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231

(N.D. Ga. 1971). *Cf. Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) (denying recovery under the ADEA for pain and suffering and punitive damages); *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (denying ADEA recovery for pain and suffering).

The Tenth Circuit entirely misses the point when it reasons that the inherent uncertainty of future damages should be placed on the employer found to be in violation of the ADEA. Such a policy determination is one properly left to Congress. Congress limited the legal remedies available under the ADEA to unpaid minimum wages and unpaid overtime compensation. *See* 29 U.S.C. § 626(b) (1982). Furthermore, in recognition of the inherent uncertainty and speculation surrounding future economic losses, Congress expressly provided for recovery of liquidated damages for willful violations which produce losses too obscure and difficult to measure. *Id. See* H. R. Conf. Rep. 950 on Age Discrimination in Employment Act Amendments of 1978, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504, 535; *Blim v. Western Electric Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, C.J., concurring and dissenting), *cert. denied*, 105 S.Ct. 233 (1984); *Prudential*, 763 F.2d at 1175 (Barrett, J., dissenting in part).

Those circuits which allow the recovery of future economic losses under the ADEA do so by virtue of ADEA language giving "the court . . . jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA] . . ." 29 U.S.C. § 626(b) (1982). However, the use of the equitable powers of a court to award damages for assumed future economic loss is not supported by the language of the ADEA which

limits the legal remedies available under the ADEA to "unpaid minimum wages or unpaid overtime compensation." *See Lorillard v. Pons*, 434 U.S. 575, 583 n.11, 98 S.Ct. 866, 871 n.11 (1978). The exercise of a court's equitable power to award future damages undermines the intent of Congress to limit the types of legal damages recoverable. While the equitable power of the court should be used to afford complete relief to an injured party in light of the objectives of the statutory scheme, "such equitable powers cannot be used to expand or override the limited legal remedies available under the ADEA." *Blim v. Western Electric Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, C.J., concurring and dissenting), *cert. denied*, 105 S.Ct. 233 (1984). "The court should not use its equitable powers to frustrate the intent of the statute." *Id.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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